7. Qualifications established by the Board include the USCG Licenses and good moral character.

8. Coleman did not meet the qualifications established by the Board; and was not certified by the Board as a qualified candidate for river port pilot apprentice.

9. By law, Association members can only consider, and select, candidates for the apprenticeship program who have been certified as qualified by the Board.

10. Coleman did not appear on the ballot of candidates for the apprenticeship program in 1999 because he had not been certified as a qualified candidate by the Board.

11. Neither the Association, the Board nor the owners/masters of the vessels piloted by river port pilots, exercise operational control over the work of river port pilots.

I. The Relationship between the involved entities

A. River Port Pilots

Pursuant to power deferred to it by federal law, Louisiana adopted legislation providing that "[t]here shall be a body of pilots known as the 'River Port Pilots' whose duty it shall be to provide pilotage services within the operating territory described in this Subpart." La. R.S. 34:992(A). River Port Pilots are commissioned by the Governor of the State of Louisiana after being certified as being qualified for such a commission by the Board (*i.e.*, not by the Association). La. R.S. 34:992(B).

B. Crescent River Port Pilots' Association

The Association is a non-profit corporation organized under Louisiana law which functions as a voluntary association. Its purpose is to provide organizational and billing services for its members. The Association coordinates the scheduling and dispatching of its members to ships and vessels requiring pilotage services on an equitable basis; and bills for and distributes the fees earned by its River Port Pilot members/shareholders from shipowners.

The Association's "members" are its shareholders. Each member of the Association owns one share of Association stock. An individual is not eligible to be a member/shareholder of the Association unless he or she possesses a commission as a River Port Pilot. Only the Governor has the ability to commission an individual as a River Port Pilot. No member of the Association is an employee of the Association. To the contrary, the members of the Association are the owners of the Association.

By law, when a ship travels in the Mississippi River, the shipowner must retain, or hire, a commissioned River Port Pilot to provide pilotage services. La. R.S. 34:997(D).[3]

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[3] One of the most egregious of the numerous misrepresentations in Coleman's Petition is found on page 12 where he states that "A pilot cannot work on the Crescent stretch of the river unless he is a Crescent pilot." This is false. Upon receiving a commission from the Governor as a River Port Pilot an individual is not required to join (*i.e.*, purchase a share of stock in) the Association. If he were to so choose, he could legally work as a River Port Pilot without becoming a member of the Association and pilot ships on the stretch of the river assigned by law to River Port Pilots. In fact, there is evidence in the record that a River Port Pilot whose membership in the Association was terminated, but who retained his commission as a River Port Pilot, continued to work as a commissioned River Port Pilot on the Mississippi River.

That retention is an independent contract between the shipowner and the individual commissioned River Port Pilot. Pursuant to that independent contract, the commissioned River Port Pilot provides pilotage services for the ship and the shipowner must pay the commissioned River Port Pilot for such services. La. R.S. 34:997(A) and La. R.S. 34:1000. As agent for its member pilots, the Association bills each shipowner for the pilotage fees owed to the River Port Pilot hired by that shipowner. If a shipowner does not pay, it is the responsibility of the individual member/pilot (*i.e.*, not the Association) to institute legal proceedings against the shipowner. La. R.S. 34:1000.

Article XII of the Association's Charter governing its operations provides that pilotage fees are earned by the pilot (*i.e.*, not the Association), but are collected by the Association as the agent for the individual Association members. The Association deducts general overhead and administrative expenses from the pilotage fees received from shipowners, and remits the remaining amounts to its individual member pilots. The Association does not deduct or withhold any taxes or FICA fees from the monies distributed to its pilot members. The Association does not accrue profits as it is a non-profit corporation. The Association is not the employer of its members. *Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans*, 25 So.2d 527 (La. 1946), *affirmed*, 330 U.S. 552 (1947), *rehearing denied*, 331 U.S. 864 (1947); *Ehret v. State of Louisiana*, 862 F. Supp. 1546, 1548 (E.D. La. 1992); *McKeithen v. S.S. Frosta*, 441 F. Supp. 1213 (E.D. La.

1977); *In re China Union Lines, Ltd.*, 342 F. Supp. 426 (E.D. La. 1971).[4]

C. Board of River Port Pilot Commissioners for the Port of New Orleans

The Board is established by Louisiana law providing that it "shall consist of three citizens appointed by the Governor with the consent of the Senate, who presently hold a commission as a river port pilot. . . ." La. R.S. 34:991(A). The Board "shall" formulate rules and regulations "establishing qualifications of river port pilots and providing for the examination and approval of apprenticeship programs for the river port pilots, and to administer

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[4] Coleman's Petition implies at pages 12 and 14 that the Association has the discretion to expel a member from the Association; and that such a pilot, having been expelled from the Association, could not thereafter legally pilot vessels "on the Crescent stretch of the river." This is false in both respects and Coleman has not cited any authority in support of these propositions. Although a member of the Association can resign from the Association at any time, the Association can only expel one of its members under two circumstances. First, where an Association member has been deprived permanently of his commission as a River Port Pilot by the Governor or his USCG Licenses by the USCG, he can be expelled from the Association. Second, a member can be expelled from the Association when he has not paid assessed fines in excess of a particular amount. Thus, Coleman's assertion that the Association can terminate a shareholder's membership in the Association, at will, is simply false. Moreover, membership in the Association is voluntary, not compulsory; and there is no requirement that a commissioned River Port Pilot must join the Association. A properly licensed and commissioned River Port Pilot can pilot vessels irrespective of whether he is a member of the Association. Where a pilot has been expelled from the Association on the grounds that he has been deprived permanently of his commission as a River Port Pilot or of his USCG Licenses, that individual would no longer be a commissioned River Port Pilot; and, thus, he could not pilot ships on the river, not because he was no longer an Association member, but because he was no longer a licensed and commissioned River Port Pilot.

the evaluation and examination of river port pilots." La. R.S. 34:991(B)(1).

The rules and regulations promulgated by the Board in accordance with La. R.S. 34:991(B)(1) were published in the Louisiana Register, Volume 21, No. 7, July 20, 1995, at p. 703-706 and provide in pertinent part:

Section 4. Apprenticeship

Rule 1

All petitions for commissions to act as river port pilots must be in writing, must be signed by the petitioner, and presented to the secretary of the board. All petitions must be accompanied by satisfactory evidence of compliance with the following prerequisites:

1. Petitioner must be of good moral character. Evidence of a clear police record will be considered, but the board reserves the right to examine other sources of information as to the applicant's character.

. . . .

Rule 2

Before being accepted as a candidate to become a river port pilot, each petitioner must meet the below listed requirements:

1. Each petitioner must hold a United States Coast Guard First Class Pilot License of steam or motor vessel of any gross tons for [four (4) specifically defined waterways].

The Board's Rules define "petitioner," "candidate" and "apprentice" as follows:

Section 1. Terms

. . . .

7. Petitioner - one who submits a petition to become a river port pilot.

8. Candidate - one whose petition has been certified by the board.

9. Apprentice - one who has been selected to become a river port pilot pending successful completion of the apprenticeship program.

II. The Process to Becoming a Commissioned River Port Pilot

Increasing the number of commissioned River Port Pilots is a multi-step process controlled by statutes adopted by the Louisiana Legislature and regulations promulgated by the Board (*i.e.*, not the Association). In this regard, the pertinent statute provides as follows:

> Whenever there exists a necessity for more pilots as determined by the river port pilots, the Board of River Port Pilot Commissioners shall hold examinations under such rules and regulations and such requirements as they shall have provided, with the governor's approval; however, no applicant shall be considered by the [B]oard unless he submits proper evidence of moral character and is a voter of this state, and shall have completed an approved apprenticeship program within the geographic area affected by this Subpart. The Board of River Port Pilot Commissioners shall issue a certificate to the governor that the applicant has satisfied the requirements of this Subpart. The governor may then, in his discretion, appoint said applicant to existing vacancies.

La. R.S. 34:993. The specific steps followed in the process are as follows:

A. The River Port Pilots Determine a Need for More Pilots and Notify the Board

Before any new River Port Pilots can be commissioned, the existing River Port Pilots must first determine that there is a need for additional pilots. La. R.S. 34:993. Once such a determination has been made, the River Port Pilots, through the Association as their agent, notify the Board that there is a demand for additional River Port Pilots. *Id.*[5]

B. The Board Considers Applications (a/k/a Petitions) From Individuals

Once the River Port Pilots have notified the Board that there is a need for additional River Port Pilots, the Board (not the Association) begins considering applications from prospective River Port Pilots. These prospective River Port Pilots are known as "petitioners." La. R.S. 34:991(B)(1).

C. The Board Certifies Those Petitioners Who Are Qualified As Candidates For River Port Pilot Apprenticeship

The Board (*i.e.*, not the Association) determines which of the petitioners are qualified to become River Port Pilots

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[5] Once the Association has notified the Board that its members have determined there is a need for additional pilots, the Association has no duties or obligations with respect thereto until the Board presents it with a list of qualified candidates for River Port Pilot apprentice. Even at that point, the River Port Pilots individually vote for River Port Pilot apprentices.

in accordance with the rules promulgated by the Board. The Board then provides the Association with a list of those petitioners whom the Board certified as being qualified to become River Port Pilots. Those individuals are known as "candidates." La. R.S. 34:991 and 993. The Association is not charged by law to determine, and has no duty, obligation, or power to determine, whether a petitioner is qualified under the rules of the Board to be a candidate for River Port Pilot apprentice.

D. The River Port Pilots Select an Appropriate Number of Apprentices

The River Port Pilots then select a number of those candidates, by majority vote, commensurate with the number of new pilots needed for entrance into the apprenticeship program. The Board cannot include on the ballot and River Port Pilots cannot select individuals who have not been certified by the Board as qualified candidates; such individuals are ineligible, as a matter of law, for inclusion on the ballot. From the list of petitioners qualified as candidates the River Port Pilots select the needed number of individuals who are then known as "apprentices." Thereafter, each apprentice begins a year-long apprenticeship program.

E. The Board Certifies and Governor Commissions

Only after successfully completing the apprenticeship program is an apprentice then certified by the Board as having completed all statutory requirements; after that he may then be commissioned by the Governor as a River

Port Pilot. The commissioned River Port Pilot may then elect to join the Association. La. R.S. 34:993.

III. Coleman was not qualified to be a candidate for River Port Pilot apprentice under the regulations duly promulgated by the Board

In the spring of 1999, the members of the Association determined, by petition, that there was a need for additional River Port Pilots. Coleman was among numerous individuals who submitted applications to the Board (*i.e.*, not to the Association).

Coleman's application reflected on its face that he was over 40 years of age ***and*** that he did not meet at least two other requirements established by the Board to be certified as a candidate for River Port Pilot. Coleman did not have ***any*** of four required USCG Licenses. Coleman's two felony convictions for "processing and attempting to distribute" marijuana and cocaine, respectively, also run afoul of the requirement that a "petitioner must be of good moral character" and rendered him unqualified under the rules of the Board.

1. Coleman has two prior felony convictions

Under the Board's Rules, a petitioner must be of "good moral character" in order to be qualified. The Board's rules specifically state that "evidence of a clear police record will be considered, but the Board reserves the right to examine other sources of information as to the applicant's character." This implies that a clear police record alone does not satisfy the requirement of "good moral character." Not only does Coleman not have a clear police record, he actually

has two felony convictions for possession with intent to distribute narcotics.

Coleman stated on his application to the Board that: "in 1985, while in the process of losing my business, I made an unfortunate decision to save it through unlawful means. I was convicted of processing and attempting to distribute controlled substances." In fact, Coleman was convicted in federal court for the Eastern District of Louisiana in 1985 of possession with intent to distribute cocaine, and in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, in 1986, of possession with intent to distribute marijuana.

The Board members have sworn that the Board has never certified a "petitioner" with a history of felony convictions as a qualified "candidate" for River Port Pilot; and that they consider such to be evidence of poor moral character. As per the testimony of one of the Board members who refused to certify Coleman as a qualified candidate, River Port Pilots are one of the first persons to board foreign ships coming into United States' ports, and the Board is very concerned about people with a history of involvement in the drug trade establishing relationships with foreign seamen entering the port of New Orleans.

2. Coleman lacked the appropriate qualifying USCG Licenses

Coleman did not hold the *four* required USCG Licenses required by Rule 2.1 of Section 4 of the rules promulgated by the Board. Section IV, Rule 2 of the rules promulgated by the Board provides that before a petitioner can be accepted as a candidate for the River Port Pilot apprentice program, he must hold a USCG License of

steam or motor vessel of any gross tons for four specifically defined waterways. Coleman admits that he did not hold any of these licenses when he submitted his application (petition) to the Board nor does he hold any of them now.

3. There was no duty on the part of defendants to assist Coleman in obtaining the USCG Licenses he needs in order to be qualified as a candidate for River Port Pilot Apprentice

Coleman's attempt to overcome his lack of licensure qualifications by asserting that his lack of qualification was itself somehow the result of the age discrimination of which he complains, fails for at least two reasons. First, there is no duty, under the ADEA or otherwise, on the part of the Association and/or its membership to assist individuals in obtaining the USCG Licenses. Second, Coleman could have obtained the service time required by the USCG, as well as the USCG Licenses themselves, without any help from the Association and/or its members.

Coleman admits that the evidence establishes that the USCG does ***not*** require that the service time in the wheelhouse of an appropriately sized vessel (which the USCG requires as a prerequisite to sit for the examination for a first class pilot license), be acquired in the presence of a commissioned pilot. Additionally, the record established that at least two pilots obtained most or all of the service time they needed to obtain the USCG Licenses without assistance from commissioned River Port Pilots, having obtained their service time in the course of their employment with a towing company as tug boat captains. Even the Association's expert witness explained that the USCG does not require the service time to be in the presence of a

commissioned pilot, but rather accepts service time obtained through employment with various tug boat companies, through permission from ships' agents or numerous other entities. This expert further explained that he obtained his service time while employed by various towing companies and that he did not obtain any service time while riding as an observer with a commissioned River Port Pilot.

4. As he was not qualified, the River Port Pilots could not select Coleman as an apprentice

Because of Coleman's felony convictions/questionable moral character and because he did not hold the appropriate USCG Licenses, the Board could not have certified him as a candidate for River Port Pilot, regardless of his age, without violating the law and/or its own rules. Therefore, the Board (as opposed to the Association) did not certify him as being qualified to be a River Port Pilot. It is undisputed that Coleman never got to the third step of the multi-step process outlined in the previous section. Although he was a petitioner, Coleman was never certified by the Board as a candidate for the River Port Pilot apprentice program.

Once the Association received the list of candidates from the Board (*i.e.*, those who were certified by the Board as qualified to become River Port Pilots) the River Port Pilots select individuals to enter the apprentice program. Coleman was never on that list because he was never certified as a candidate by the Board. So, he could not be selected by the River Port Pilots to be among the apprentices to enter the apprentice program.

SUMMARY OF ARGUMENT

The Association respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's decision affirming the district court's grant of summary judgment. The decision is proper on three separate grounds:

First, the ADEA, which is the sole basis for the petitioner's claims in this matter, is not applicable to his relationship with the Association because River Port Pilots are not employees of the Association, but rather are independent contractors hired on a voyage-by-voyage basis by the owners of the ships which they pilot. Thus, petitioner was not a prospective employee of the Association. It is well settled that the ADEA only applies to employee/employer relationships. This was the ground upon which summary judgment was both granted and affirmed.

Second, even if it is applicable, petitioner has not adduced sufficient evidence to constitute a *prima facie* case of discrimination under the ADEA because he was not qualified for the position sought (*i.e.*, River Port Pilot apprentice) under the rules duly promulgated by the Board. He was disqualified because he did not hold the proper USCG Licenses and he had two prior felony convictions for possession with intent to distribute narcotics.

Finally, by law, apprentices can only be selected from a list of qualified candidates as determined by the Board. Thus, it is impossible for the Association to have discriminated against petitioner (*i.e.*, there was no discrimination in fact under the ADEA) because it is undisputed that he was not certified as a qualified candidate for River Port Pilot apprentice by the Board. Thus, he could not be selected because the Board did not put his name on the ballot!

The district court was correct in granting and the Fifth Circuit in affirming summary judgment in favor of the Association and the Board because reasonable persons could not conclude, based on the record evidence, that River Port Pilots are employees of the Association and/or Board; that petitioner made out a *prima facie* case of discrimination under the ADEA; or that there was any discrimination in fact by the Association against petitioner.

REASONS FOR DENYING THE WRIT

The petition does not warrant review by this Court. The decisions below were based upon the particular facts and circumstances concerning River Port Pilots which rendered petitioner without an ADEA claim. Moreover, significant grounds independent from those set forth in the petition exist for the basis of the decision below. Respondent urges this Court not to waste its resources on a case that does not present any compelling reasons for review. Further, granting the petition will have no impact on litigants in general and will not clarify the law.

I. The ADEA (which is the sole basis for Coleman's claims) is inapplicable because Commissioned River Port Pilots are not employees of the Association or the Board; rather, they are independent contractors

Coleman's claims in this matter are premised solely on the ADEA. It is well settled that the ADEA applies only in the context of an employee/employer relationship, and does not apply where the plaintiff is an independent contractor. *Fields v. Hallsville Indep. School Dist.*, 906 F.2d 1017 (5th

Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983); *Ehret v. State of Louisiana*, 862 F. Supp. 1546 (E.D. La. 1992).

Coleman can only succeed if the Association is an "employer," "employment agency," or "labor organization" within the meaning of the ADEA which provides in pertinent part:

> (a)(1) It shall be unlawful for an ***employer*** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .
>
> (b) It shall be unlawful for any ***employment agency*** to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age. . . .
>
> (c)(1) It shall be unlawful for a ***labor organization*** to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age. . . .

29 U.S.C. § 623(a)(1); (b); and (c)(1) (emphasis added).

By its plain terms, the ADEA applies *only* to ***employers, employment agencies***, *and* ***labor organizations***. All three such entities are specifically defined at 29 U.S.C. § 630.[6] Classification of a defendant as any of the three

[6] Although these terms are defined in the ADEA, the definitions themselves are of no help in this matter. "Employer" is defined at 29 U.S.C. § 630(b) as "a person engaged in an industry affecting commerce

(Continued on following page)

listed entities is entirely dependent upon the plaintiff being an "employee" within the meaning of the ADEA.

Considering the evidence submitted in this matter and based on its previous rulings on this very same issue, the district court held that there was no genuine issue of material fact with respect to whether the Association or the Board are entities subject to liability under the ADEA; and finding defendants not to be entities subject to the ADEA because they are not "employers" within the meaning of the ADEA, granted their summary judgment motions. Although it applied additional factors in its analysis, the Fifth Circuit affirmed on the same grounds (*i.e.*, the defendants are not "employer").

The lower courts were correct in determining that River Port Pilots are independent contractors, not employees; and, consequently, that neither the Association nor the Board are employers, employment agencies, or labor organizations within the meaning of the ADEA. Although they applied different tests, both the district court and Fifth Circuit considered substantially similar factors in determining that the Association lacked the requisite control over River Port Pilots to make it an "employer" for purposes of the ADEA.[7]

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who has twenty or more employees. . . ." Likewise the definitions of "employment agency" (§ 630(c)) and "labor organization" (§ 630(d)) include the terms "employees" and "employers" without further explanation. The term "employee" is defined in the ADEA as "an individual employed by an employer. . . ." 29 U.S.C. § 630(f).

[7] Coleman also argues at page 13 of his Petition that airline pilots, engineers, trial attorneys, and ship captains, sometimes work as employees. This is a specious and irrelevant analogy. The employee/independent contractor issue in this matter cannot be decided on the basis of the type of relationship which may or may not exist between others, or even upon what is the most prevalent type of

(Continued on following page)

A. The district court's test: *Ehret*

The district court held that the appropriate test for determining whether River Port Pilots are employees or independent contractors was set forth in *Ehret,* as follows:

> It is undisputed that neither the Board nor the Association actually hires river port pilots. Thus, in determining whether these entities are "employers," the Court must apply a "hybrid test" which considers the "economic realities" of the work relationship as an important factor in the calculus, but which focuses more on the employer's control over the worker's performance.
>
> . . . .
>
> [T]he "right to control" is the most important factor in determining employee status.

Ehret, 862 F. Supp. at 1549 (citations omitted).[8]

The plaintiff in *Ehret* made the same allegation against the Association as made by Coleman.[9] The Association's relationship with River Port Pilots has not changed

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relationship that exists in a particular industry. Rather, the issue in this matter depends solely on the facts and circumstances of the particular relationship existing between River Port Pilots and the Association and/or Board. Based on that relationship, River Port Pilots are independent contractors. The evidence is clear that neither the Association nor the Board exercises operational control over the work product (*i.e.*, the navigational advice) of River Port Pilots.

[8] *Ehret* also set forth eleven other relevant factors in determining employment status. *See also McKeithen v. The SS Frosta*, 441 F. Supp. 1213 (E.D. La. 1977); *Fields*, 906 F.2d at 1019-20.

[9] The plaintiff in *Ehret* was similarly situated to Coleman, with the exception that the plaintiff in *Ehret* was otherwise qualified (*i.e.*, had all required USCG Licenses and was of good moral character), whereas Coleman is not.

since the *Ehret* case was decided. Then, as now, the Association has no right to exercise operational control over its members in the performance of their duties. In holding that the Association was not the employer of River Port Pilots, and that River Port Pilots were "independent contractors" and not "employees," the *Ehret* court recognized that the Association does not exercise operational control over the services provided by pilots to the vessels they pilot. *Ehret,* 862 F. Supp. at 1550.

The *Ehret* court also cited the following factors as standing for the proposition that the Association is not the "employer" of River Port Pilots and/or that River Port Pilots are not "employees": "(1) The Association does not hire or fire pilots, (2) Pilots are specialists with a high degree of skill, (3) The Association deducts no withholding tax or Social Security from amounts paid to the pilots, and (4) The pilots accrue no annual leave time." *Id.*

The *Ehret* court noted that the only factor which militated in favor of an employee/employer relationship was the fact that the Association administers a retirement plan for its members. *Id.* However, the *Ehret* court held that single factor to be "insufficient to make the Association an employer of pilots for the purposes of the ADEA. Thus, the Court finds that the pilots operate as independent contractors, and the Association is not an employer under the ADEA." *Id.*; *see also Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 376, 381 n.6 & 382 (E.D. La. 1997) (collecting cases); *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994).

In a recent case involving whether a principal exercised operational control over its contractor, so as to subject the principal to vicarious liability for the contractor's actions, the Fifth Circuit held that "operational control exists only if

the principal has direct supervision over the step-by-step process of accomplishing the work such that the contractor is not entirely free to do the work in his own way." *Fruge v. Parker Drilling Co.*, 337 F.3d 558, 564 (5th Cir. 2003), *cert. denied*, 540 U.S. 1161 (2004). The navigational advice given by a River Port Pilot to the master of the vessel he is piloting is completely and entirely within the discretion of the River Port Pilot, and neither the Association nor the master of the vessel being piloted exercises supervision or control over the River Port Pilot's advice. River Port Pilots are highly skilled professionals whose duties are to navigate large ocean going ships in a swiftly flowing river, with treacherous currents, eddies, sharp bends and ever evolving sandbars and shoals. The River Port Pilot charged with piloting the ship must take into account innumerable and ever changing circumstances in formulating the navigational advice which is his work product. The weather, the tides, the river's current, other vessels, the speed, size, power and capabilities of the vessel being piloted, and many other factors must all be taken into consideration by the River Port Pilot when formulating his navigational advice. This of necessity requires great skill and autonomous, split second decision making.

The River Port Pilot, however, does not actually take physical control of the ship (*i.e.*, he does not physically take the helm). Rather, the River Port Pilot gives ***navigational advice*** to the master of the vessel, who remains at all times, in control of the ship. Although the master of the vessel is free to disregard the River Port Pilot's advice, he has no control over, or input into, the navigational advice given by the River Port Pilot. Regardless, it would be totally impractical, and probably dangerous, for any one other than the River Port Pilot to exercise operational control of the work

product of the River Port Pilot (*i.e.*, his navigational advice). The Association does not exercise any operational control over the navigational advice given by the River Port Pilots to the master of the vessel being piloted.

The *Ehret* court's characterization of River Port Pilots as "independent contractors" and not "employees" was correct then, and is still correct now. Neither the Association nor the shipowners/masters of the vessels being piloted deduct or withhold taxes or FICA fees from the monies paid to River Port Pilots. Neither the Association nor the owners/masters of vessels can dictate when a River Port Pilot must work. River Port Pilots accrue no "vacation" time, and can work as often or as little as desired.

Finally, were the Association the "employer" of River Port Pilots, it would be subject to liability for the actions of River Port Pilots pursuant to the concept of *respondeat superior*. However, in the case of River Port Pilots, it is well settled that the Association is ***not*** vicariously liable for the actions of its members. *McKeithen*, 441 F. Supp. at 1220 (citing *Guy v. Donald*, 203 U.S. 399 (1906); *Dampskibsselskabet Atlanta A/S v. The United States*, 31 F.2d 961 (5th Cir. 1929)). Louisiana law also specifically provides that a pilot is himself personally responsible for any damages caused by his or her negligence. *See* La. R.S. 34:1001(D); *Koepp v. Sea-land Service, Inc.*, 645 So.2d 1269 (La. App. 4 Cir. 1994). Further, the Association's Charter specifically states that the Association is not responsible for the debts or faults of its members.

B. The Fifth Circuit's test: *Clackamas*

The Fifth Circuit also considered paramount the matter of control. It, however, applied the control standard

approved by this Court in *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003), which had been adopted by the EEOC in questioning whether a partner, officer, major shareholder or director qualifies as an employee. The Fifth Circuit found that analysis appropriate given the relationship between River Port Pilots and the Association. Nevertheless, the issue remained "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 448. In making that determination, the factors to be considered are:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.

2. Whether, and if so, to what extent the organization supervises the individual's work.

3. Whether the individual reports to someone high in the organization.

4. Whether, and if so, to what extent the individual is able to influence the organization.

5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

6. Whether the individual shares in the profits, losses, and liabilities or the organization.

Id. at 449-50. In analyzing those factors with respect to the Association, the Fifth Circuit held that each factor weighed against labeling River Port Pilots as employees for purposes of the ADEA.

In analyzing the first factor, the ability to hire and fire, the Fifth Circuit recognized that the Association did

not do so. Instead, the Fifth Circuit held that although the Association's members (*i.e.*, the River Port Pilots) elected apprentices, neither the Association nor its members have the power to grant the state commission necessary to be a River Port Pilot as that power resides with the Governor and that neither the Association nor its members have the power to decommission a River Port Pilot. Further, insofar as regulating the actual job performance of a River Port Pilot, the role of piloting belongs solely to the River Port Pilot and not the Association whose responsibility is essentially to dispatch a River Port Pilot to a ship needing one which, in turn, directly engages the River Port Pilot and to collect and disburse pilotage fees. Thus, this factor "weigh[s] against labeling the pilots ADEA employees."[10]

The Fifth Circuit held with respect to the second and third factors that the Association did not supervise an individual River Port Pilots' work (*i.e.*, piloting a vessel) and that no River Port Pilot reported to someone higher in the Association. The Fifth Circuit recognized that no chain of command existed in the Association concerning the performance of piloting a vessel as each individual River Port Pilot offered his own independent professional judgment in the course of navigation.[11]

As the River Port Pilots constitute the entire membership of the Association with each one holding an equal share and participation in election of its board of directors, etc., the Fifth Circuit held with respect to the fourth factor that each River Port Pilot exerted substantial influence over the Association's management as well as its rules and

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[10] 437 F.3d at 481.

[11] *Id.*

regulations. Thus, this factor "weighs against labeling the pilots ADEA employees."[12]

The Fifth Circuit held with respect to the fifth factor that the Association's charter clearly and unequivocally provides that no employment relationship exists between the Association and any River Port Pilot. Once again, the Fifth Circuit found "[t]his factor also weighs against labeling the pilots ADEA employees."[13]

The Fifth Circuit held that the River Port Pilots share in the Association's profits/losses according to an agreed upon formula between them (*i.e.*, the River Port Pilots). The Court also held, citing *McKeithen*, 441 F. Supp. at 1220, that each River Port Pilots is liable for his own negligence consistent with the fact that they act independently according to their own professional judgment in piloting a vessel and that the Association is not subject to *respondeat superior* liability. Consequently, the sixth factor "also weighs against labeling the pilots ADEA employees."[14]

In summary, the Fifth Circuit concluded that each factor established a lack of employer-like control over the River Port Pilots: the Association does not hire or fire River Port Pilots nor can it decommission them; it does not supervise the work of the River Port Pilots; its charter does not create an employer-employee relationship; each River Port Pilot performs his job according to his own professional judgment; the River Port Pilots have ultimate

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[12] *Id.*

[13] *Id.*

[14] *Id.*

control over the Association management, rules and regulations; and each River Port Pilot maintains personal liability for his own negligence without vicarious liability attaching to the Association.[15]

Regardless of what test is applied, the Association lacks the requisite control over the River Port Pilots to make it an "employer" for purposes of the ADEA.[16]

II. 29 C.F.R. § 1625.21 does not expand the scope of the ADEA beyond the context of an employee/ employer relationship

Coleman argues that certain changes in the Code of Federal Regulations (CFR), which make the ADEA applicable to apprenticeship programs, somehow overrules the holding in the *Ehret* case, and/or brings the Association within the ambit of the ADEA. However, the CFR regulation cited by Coleman merely expanded the activities prohibited by the ADEA to include age discrimination in apprenticeship programs.

29 CFR § 1625.21 provided at the time *Ehret* was decided, and still provides today, that "the terms *person, employer, employment agency, labor organization,* and *employee* shall have the meanings set forth in § 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, hereafter referred to as the Act." The enactment of 29 CFR § 1625.21, which brought "all apprenticeship programs" within the ambit of

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[15] *Id.* at 481-82

[16] Even the focus of *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992), relied upon by Coleman, is "right of control" and, in this case, it simply does not exist.

the ADEA, did not alter the definitions of "employer," etc., found in the ADEA, nor did it alter § 1625.21.

Consequently, the inclusion of a prohibition against discrimination in apprenticeship programs within the implementing regulations of the ADEA merely added additional activities which those entities already subject to the ADEA are prohibited from engaging in. The new regulation did not expand the universe of entities to which the ADEA applies in the first place. *See Coleman v. New Orleans Baton Rouge Steamship Pilots Ass'n,* 2004 WL 1237447 (E.D. La. 2004). The ADEA, at the time of *Ehret* and now, applies only to employers, employment agencies, and labor organizations. *See* 29 U.S.C. § 623(a)(1); (b) and (c)(1). The CFR regulation cited by Coleman does not change that.

The Second Circuit case[17] cited by Coleman does not stand for the proposition that the ADEA applies in the context of a principal/independent contractor relationship. In that case it was ***assumed*** that the plaintiff was an ***employee*** and that Title VII applied. There was no discussion, much less a holding, in the case that Title VII (or the ADEA) applied outside of the context of an employee/employer relationship.

Accordingly, as held by the lower courts in this matter and in *Ehret*, River Port Pilots are not "employees" within the meaning of the ADEA. Consequently, the ADEA does not apply to Coleman's claims in this matter.

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[17] *E.E.O.C. v. Joint Apprenticeship Committee of Joint Industry Bd.*, 186 F.3d 110 (2nd Cir. 1990).

III. The Work Rules were properly not considered; regardless, they are irrelevant

Coleman argues that the Association's Work Rules evidence the Association's control over its members so as to make it the employer of its members. Not only are Coleman's arguments incorrect, but, he did not timely submit the Work Rules as evidence opposing summary judgment.[18]

One of the primary purposes of the Association is the scheduling and dispatching of its members to ships in need of pilotage services. In furtherance of that purpose, the Association has adopted detailed Work Rules relative to the scheduling and assignment of its members to vessels in need of pilotage services. The Work Rules are rules which the Association's members have imposed upon themselves to insure an equitable and fair distribution of work and pilotage fees among the Association members.

The Association member's share of net pilotage fees is not based on the number of ships piloted, but rather on the number of days on duty. The Work Rules are necessary to insure that the pilotage work load is fairly and equitably distributed among the Association's members. Two pilots who are both "on duty" the same number of days in any given month receive the same share of net monthly pilotage fees irrespective of how many vessels each man has piloted during that month. Thus, the detailed Work Rules insure that each Association member does his fair share of

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[18] Although formally produced to Coleman over 6 months prior to the filing of summary judgment, the Work Rules were not included in the evidence he submitted to the district court. Thus, the Work Rules were properly not considered by the lower courts.

the work while on duty (*i.e.*, pilots his fair share of vessels during the duty period). These are quite literally rules imposed upon the Association members by themselves to set out the order and/or rotation by which pilots on duty are called to perform pilotage services. River Port Pilots can work as much or as little as they like by volunteering for extra duty (for extra pay) in the place of pilots taking time off, or can take as much time off (without pay) as they like. Member pilots can be fined for violations of the Work Rules, for other misconduct, and for failing to report accidents to the Board. However, the Work Rules ***do not*** affect the navigational advice given by a River Port Pilot to the master of the vessel he is piloting.

Neither the Work Rules nor the Association as an entity, control the operational details of the pilot's work (*i.e.*, the navigational advice which the pilot provides to the ship under pilotage). Therefore, Coleman's argument that the Work Rules are evidence of control exercised by the Association over its members is erroneous. The Work Rules do not dictate what navigational advice a pilot provides to a ship under pilotage, and therefore do not constitute the type of operational control which is the hallmark of an employee/employer relationship. *See McKeithen*, 441 F. Supp. at 1220; *Ehret*, 862 F. Supp. at 1549-50.

CONCLUSION

Contrary to the unsupported and incorrect factual allegations and specious analogies contained in Coleman's Petition, the Association does not exercise operational control over the work of River Port Pilots. It does not hire or fire River Port Pilots and it has no discretionary right to

expel a member River Port Pilot, although the Association's Charter establishes that if a member/shareholder loses his USCG Licenses or fails to pay fines exceeding a particular amount, he by agreement relinquishes his membership share of stock. Moreover, absent decommissioning by the Governor, a River Port Pilot can continue to work as a commissioned River Port Pilot on the Crescent stretch of the Mississippi River and not be a member of the Association. The Association does not deduct or withhold taxes from the pilotage fees it collects on behalf of its members, it does not provide annual sick or vacation leave, health insurance or any other such benefits to its members. Simply put, none of the factors of any potentially applicable test militate in favor of employee status for River Port Pilots. Therefore, River Port Pilots are not employees of the Association; and the ADEA is not applicable.

Accordingly, for all the foregoing reasons, the Association respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

Louisiana Revised Statutes
Title 34. Navigation and Shipping
Chapter 6. Pilots
Part I. Port of New Orleans
Subpart B. River Port Pilots

§ 991. Board of River Port Pilot Commissioners; duties, appointment, qualification, and removal of members

A. There is hereby created the Board of River Port Pilot Commissioners for the Port of New Orleans. The board shall consist of three citizens appointed by the governor, with the consent of the Senate, who presently hold a commission as a river port pilot and such commission has been active for a period of not less than four years. The governor, in appointing the said commissioners, shall designate the president of the board. The commissioners shall serve at the pleasure of the governor. The said commissioners shall take an oath to faithfully perform their duties.

B. The Board of River Port Pilot Commissioners for the Port of Orleans shall:

(1) Formulate rules and regulations pursuant to the Administrative Procedure Act establishing qualifications of river port pilots and providing for the examination and approval of apprenticeship programs for the river port pilots, and to administer the evaluation and examination of river port pilots.

(2) Meet at least quarterly and at all such times as the president of the commission deems necessary.

(3) Formulate rules and regulations pursuant to the Administrative Procedure Act establishing minimum standards of conduct for river port pilots to

include neglect of duty, drunkenness, carelessness, habitual intemperance, substance abuse, and incompetency, and make other rules and regulations for the proper and safe pilotage upon the waters covered by this Subpart and for the efficient administration of this Subpart.

(4) Conduct hearings pursuant to the Administrative Procedure Act, including the right to subpoena documents and witnesses pursuant to R.S. 49:956, and investigate the violation of any provisions of this Subpart or rules or regulations adopted by the commissioners, and to report all findings and conclusions to the governor, should the board request action by the governor.

(5) Have the authority to impose a fine of not more than five hundred dollars upon any river port pilot, to reprimand or remove from a vessel any river port pilot, or to recommend to the governor that the commission of any river port pilot be suspended or revoked if after a hearing conducted in accordance with the Administrative Procedure Act, a river port pilot is found in violation of any rule or regulation adopted by the Board of River Port Pilot Commissioners. In any event, the Board of River Port Pilot Commissioners shall have the authority also to suspend a river port pilot's commission in accordance with R.S. 49:961(C).

(6) Provide to all river port pilots and river port pilot candidates rules and regulations.

C. For purposes of this Subpart and the Administrative Procedure Act only, the term commission shall be used interchangeably with the term license and shall have the same meaning.

§ 991.1. Repealed by Acts 2004, No. 902, § 2, eff. Jan. 1, 2005

§ 992. River port pilots; duties; appointment

A. There shall be a body of pilots known as the "river port pilots" whose duty it shall be to provide pilotage services within the operating territory described in this Subpart.

B. River port pilots shall be duly appointed and commissioned by the governor and shall serve as provided by law or until revocation of the appointment or commission by the governor in accordance with this Subpart.

§ 993. Examinations for appointment; qualifications

Whenever there exists a necessity for more pilots as determined by the river port pilots, the Board of River Port Pilot Commissioners shall hold examinations under such rules and regulations and such requirements as they shall have provided, with the governor's approval; however, no applicant shall be considered by the board unless he submits proper evidence of moral character and is a voter of this state, and shall have completed an approved apprenticeship program within the geographic area affected by this Subpart. The Board of River Port Pilot Commissioners shall issue a certificate to the governor that the applicant has satisfied the requirements of this Subpart. The governor may then, in his discretion, appoint said applicant to existing vacancies.

§ 994. Oath; bond

Each river port pilot shall take an oath of office and furnish bond to the extent of one thousand dollars.

§ 995. Association of river port pilots

The said river port pilots may form themselves into an association as to them may seem fit, not in conflict with law, or with the rules and regulations of the river port pilot commissioners, but nothing herein shall affect any association presently existing.

§ 996. Operating territory

A. The river port pilots shall have the exclusive right to pilot vessels on the Mississippi River between New Orleans, Louisiana and Pilottown, Louisiana and within the Port of New Orleans between Southport and Merauxville; within the Industrial Canal, between the Mississippi River to and including Lake Pontchartrain; within the Intracoastal Canal, between the Industrial Canal and the turning basin at Michoud, inclusive; also for the Mississippi River Gulf Outlet between the Industrial Canal and Mile 28.3, the Gulf Intracoastal Waterway from the Louisiana-Mississippi state line to the Mississippi River Gulf Outlet, including Michoud Slip and Michoud Canal, Chef Pass, Algiers Cutoff, and the Harvey Canal; the Venice Jump within six and one-half miles of the Mississippi River; Bayou Sauvage; and Bayou Liberty.

B. However, nothing herein contained shall prevent an exchange of river port pilots at what is known as "Quarantine Anchorage" or "The Point" or "General Anchorage" between the river port pilots herein named and the pilots engaged in the piloting of vessels above

Southport, nor shall anything herein provided prevent pilots engaging in piloting vessels above Southport from ending or beginning the pilotage from any wharf or "The Point" or "General Anchorage" in the Harbor of New Orleans.

§ 997. Pilotage fees; vessel subject to pilotage

A. The river port pilots shall be entitled to ask for and to receive a fee for their pilotage services.

B. The fees for pilotage services shall be established in accordance with R.S. 34:1121, et seq.

C. The river port pilots shall also be entitled to enter into agreements with the masters, owners, or their agents, of ships and vessels, not otherwise subject to compulsory pilotage as provided by these statutes, for special services, boats, equipment, transportation, and other necessary fees at such rates and for such sums as may be agreed between them, but not to exceed those rates established in accordance with R.S. 34:1121, et seq.

D. All vessels shall employ a river port pilot when navigating the operating territory described in this Subpart except those vessels exempted by the laws of the United States or vessels of one hundred gross tons or less.

E. In case of refusal to take such river port pilot, the master, owner, agent, or consignee of any vessel required to employ a river port pilot shall pay the established pilot fee as if a river port pilot had been employed.

§ 998, 999. Repealed by Acts 1986, No. 960, § 2

§ 1000. Privilege for charges and attorney's fees

The river port pilots shall have a lien and privilege upon any vessel employing a river port pilot for the nonpayment of pilotage fees and charges and for all reasonable attorney fees incurred in connection with the recovery of pilotage fees and charges and enforcement of lien. The lien and privilege may be enforced in any court of competent jurisdiction.

§ 1001. Repealed by Acts 2004, No. 902, § 2, eff. Jan. 1, 2005

§ 1002. Violations and penalties

Anyone attempting to exercise the functions herein vested in the said river port pilots, who has not been commissioned by the governor, shall be fined not less than one thousand five hundred dollars, nor more than five thousand dollars, or imprisoned not less than thirty days, nor more than four months, or both, at the discretion of the court in whose jurisdiction the offense is committed.

§ 1002.1. Employing pilot without a state commission; penalties

A. No master, owner, or agent of a vessel required under this Subpart to take a state commissioned river port pilot shall perform the duties of a river port pilot nor employ a person who is not a state commissioned river port pilot.

B. Whoever violates this Section shall be fined not less than one thousand five hundred dollars nor more

than five thousand dollars, or imprisoned for not more than six months, or both.

§ 1003, 1004. Repealed by Acts 1986, No. 960, § 2

§ 1005. Privilege; communications between river port pilot and Board of River Port Pilot Commissioners

Unless required by a subpoena issued by a court of competent jurisdiction, all communications by and between the Board of River Port Pilot Commissioners and a river port pilot, including all testimony, statements, drawings, logs, or other information designated confidential by the Board of River Port Pilot Commissioners, obtained by, or provided to, the Board of River Port Pilot Commissioners in connection with or during the course of any investigation or hearing shall be privileged and such circumstances, testimony, statements, drawings, logs, or other information designated confidential shall not be required to be disclosed in any original proceedings save the appeal process in accordance with the Administrative Procedure Act and pursuant to reporting requirement to the governor.

§ 1006. Blank

§ 1007. Repealed by Acts 1968, No. 579, § 8

§ 1008. Repealed by Acts 1986, No. 960, § 2

§ 1009. Employing pilot without a commission; liability of vessel, master, and owner

A vessel which is required to use a river port pilot pursuant to this Subpart and fails to do so when a river port pilot offers his services, the vessel, its captain, and owners

shall be liable for a civil penalty and shall forfeit to the state of Louisiana the sum of fifteen thousand dollars, with privilege on the vessel, to be recovered before any court of competent jurisdiction. An action for forfeiture under this Section may be brought by the attorney general of the state of Louisiana or by the Board of River Port Pilot Commissioners. If a judgment is obtained hereunder, the court shall include in its judgment an award for reasonable attorney fees and costs incurred in connection with the prosecution of such action.

Supreme Court, U.S.
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No. 05-1347

In The
Supreme Court of the United States

TERRY C. COLEMAN,

Petitioner,

v.

NEW ORLEANS AND BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION, CRESCENT RIVER PORT PILOTS ASSOCIATION, INC., and BOARD OF RIVER PORT PILOT COMMISSIONERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NEW ORLEANS & BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The New Orleans & Baton Rouge Steamship Pilots' Association (NOBRA) is a not-for-profit corporation formed "[t]o carry on the business of piloting sea-going and other vessels on the Mississippi River," between the ports of New Orleans and Baton Rouge. It is owned by its member pilots, each of whom holds one share of its stock. Are the pilot-shareholders "employees" of NOBRA for purposes of the Age Discrimination in Employment Act of 1967 (ADEA)?

CORPORATE DISCLOSURE STATEMENT

NOBRA is a pilot association established by a statutory compulsory pilotage system. It is a private, not-for-profit corporation of New Orleans and Baton Rouge pilots, with all its stock owned by its member pilots.

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STATEMENT OF THE CASE

Coleman's Statement of the Case includes many allegations having no bearing on the issue raised in his petition. The issue here is whether NOBRA is an "employer" for purposes of the Age Discrimination in Employment Act of 1967 (ADEA). The ADEA defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees. . . ." 29 U.S.C. § 630(b). The administrative staff of NOBRA numbers fewer than 20. Unless the pilot-shareholders are counted as employees, NOBRA does not meet the 20-employee threshold for ADEA application. Determining whether the pilot-shareholders are employees requires focus on NOBRA's legal status as a juridical person, its organization, it functioning, its legal relationship with its pilot-shareholders, and most importantly, its control (or lack thereof) of a pilot's actions in piloting a vessel on the Mississippi River. These crucial facts receive little attention in Coleman's Statement of the Case.

NOBRA believes that the following facts will assist the Court in deciding whether to grant certiorari:

A. NOBRA's organization and functioning.

NOBRA is a pilot association established by a statutory compulsory pilotage system. It is a private, not-for-profit corporation of New Orleans and Baton Rouge pilots, which exists for the purpose of dispatching pilots for foreign-flagged vessels from the port of New Orleans to 31° North Latitude and return, including the port of Baton Rouge and intermediate ports.

NOBRA receives requests for pilotage from ship agents and dispatches available pilots to vessels from a roster. It collects pilots' fees, pays general overhead expenses from the receipts, and remits the net remaining receipts on a monthly basis to the individual member pilots.[1] NOBRA does not accrue profits of its own from its pilots' work. NOBRA does not withhold tax or FICA on money distributed to its pilot-shareholders. At the end of the year, each pilot-shareholder receives from NOBRA an IRS Form 1099 (for non-employee compensation), not a W-2.

NOBRA is organized on a capital-stock basis; each incoming member purchases one share of NOBRA's stock. Although NOBRA elects pilots into membership, pilots do not become shareholders until they are commissioned by the Governor. NOBRA has no authority to hire or fire a shareholder; the sole authority to commission or decommission a pilot rests with the Governor. When a shareholder dies or resigns from NOBRA, ownership of that shareholder's stock reverts to NOBRA, and NOBRA returns to the former member or his heirs the value of the stock.

B. NOBRA's lack of control over its pilots' work.

River pilots are highly skilled professionals whose duties are to navigate large ocean-going ships in a swiftly flowing river, with treacherous currents, eddies, and sharp bends. These duties require autonomous, split-second

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[1] Coleman's reference to "an annual salary" on page 4 of his petition is incorrect. The NOBRA pilots' compensation is actually a share of profits (piloting fees less administrative expenses), computed according to the number of days the pilot is available to work.

decision-making. When aboard a vessel, the pilot gives navigational advice to the master of the vessel. Though the master is free to disregard the pilot's advice, the master has no control over the navigational advice given by the pilot. Similarly, NOBRA cannot and does not exercise any influence or control over how a pilot navigates a vessel once aboard.

C. Becoming a pilot-shareholder of NOBRA.

The gatekeeper for NOBRA membership is the Board of Examiners, a state regulatory agency and a legal entity separate from NOBRA. It is composed of three individuals appointed by the Governor, with advice and consent of the Louisiana Senate. La. Stat. Ann. § 34:1042. The Board of Examiners reviews the applications of all applicants for election into NOBRA to ensure that they meet the legal requirements. Louisiana law requires that the applicant "shall not have reached his or her forty-fifth birthday before being commissioned." La. Admin. Code tit. 46, § 6107.

After determining which applicants meet the legal requirements, the Board of Examiners forwards to NOBRA the names of the qualified candidates. NOBRA then places those names on a ballot for election.

NOBRA conducts its election by a majority vote of its shareholders. Once elected, the candidate must then go through a pilot apprentice program administered by the Board of Examiners. NOBRA does not operate the apprentice program. It does not, and by law cannot, select the timing, manner, course of work, grading process, examinations, or any other aspect of the apprentice program operated by the Board of Examiners.

Apprentices receive no pay while in the apprentice program. During their apprenticeship, they are not shareholders of NOBRA.

When an apprentice has successfully completed the program, the apprentice's name is submitted by the Board of Examiners to the Governor. Louisiana law vests the Governor with the discretion to commission a candidate. La. Stat. Ann. § 34:1045. If commissioned by the Governor, the former apprentice receives a certificate as a New Orleans Baton Rouge Steamship Pilot. Only then can the former apprentice, now a pilot, became a shareholder of NOBRA.

D. Terry C. Coleman and the 2001 election.

Terry C. Coleman was born on October 6, 1951. In August 1996, he submitted to the Board of Examiners an application to become a state-commissioned pilot. He testified that, within a week or two of the April 2001 election, he "resubmitted" his application. The Board did not approve Coleman's application and did not submit his name to NOBRA as a qualified candidate.

After the Board of Examiners submitted the names of qualified candidates, NOBRA conducted its election. Since the Board of Examiners never certified Coleman as a candidate, NOBRA had no legal authority to include him on the ballot. (The Board of Examiners is not a defendant in this case; Coleman is pursuing separate litigation against the Board in state court.)

E. Proceedings below.

Compared to the intricacies of the system governing piloting in Louisiana, the procedural history here is fairly

simple. Coleman brought an ADEA action against NOBRA. He also brought a separate ADEA against another pilots' association, Crescent River Port Pilots Association, Inc., and the Board of River Port Pilot Commissioners. In due course, NOBRA moved for summary judgment, contending that it is not an "employer" for ADEA purposes. The defendants in the *Crescent* action brought a similar motion. The district court granted summary judgment dismissing Coleman's claims and denied Coleman's motion for reconsideration or new trial.[2] The Court of Appeals affirmed.[3]

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari does not present any of the reasons for granting a writ identified in Rule 10 of this Court's rules.

The issue of federal law addressed by the Court of Appeals here is the same as that addressed by this Court just three years ago in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003): Under what circumstances will a shareholder of a corporation be considered the corporation's "employee" for purposes of

[2] *Coleman v. New Orleans Baton Rouge Steamship Pilots Assn.*, 2004 WL 1237447, 2004 U.S. Dist. LEXIS 10049 (E.D. La. June 1, 2004), *reconsideration denied*, 2004 WL 1555243, 2004 U.S. Dist. LEXIS 12916 (E.D. La. July 9, 2004); *Coleman v. Crescent River Port Pilots Assn.*, 2004 WL 1278005, 2004 U.S. Dist. LEXIS 10588 (E.D. La. June 8, 2004), *reconsideration denied*, 2004 WL 1664017, 2004 U.S. Dist. LEXIS 14225 (July 23, 2004).

[3] *Coleman v. New Orleans & Baton Rouge Steamship Pilots' Assn.*, 437 F.3d 471 (5th Cir. 2006).

federal anti-discrimination statutes? To answer this question, the Court of Appeals turned to the common law as enunciated in *Clackamas* and concluded that the pilot-shareholders of NOBRA are not NOBRA's employees. Coleman complains that the Court of Appeals "focused incorrectly on the *Clackamas* standard,"[4] but fails to support this conclusory statement with any legal argument.

Contrary to the suggestion on pages 10-11 of the Petition, the Court of Appeal's decision here does not conflict with that of the Second Circuit in *EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110 (2d Cir. 1998). In that case, the Second Circuit neither addressed nor decided the crucial issue here: whether the defendant was an "employer" for purposes of federal anti-discrimination statutes. That decision cannot possibly conflict with the Court of Appeals' decision here, because the two decisions resolved completely different issues.

ARGUMENT

A. The legal issue decided by the Court of Appeals here – whether a shareholder is an employee of a corporation for purposes of federal anti-discrimination statutes – was decided just three years ago by this Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

The ADEA forbids employers from certain forms of discrimination based on age. 29 U.S.C. § 623(a). It defines

[4] Pet. at 11.